TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 367.

W. S. KIRBY, APPELLANT,

vs.

AMERICAN SODA FOUNTAIN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED JULY 24, 1906.

(19,006.)

27869

(19,008.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 357.

W. S. KIRBY, APPELLANT,

vs.

AMERICAN SODA FOUNTAIN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 15, 1904.

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1 *Caption.*

Be it remembered, that at a term of the circuit court of the United States, in the fifth circuit thereof, and in and for the northern district of Texas, begun and holden at Dallas, Texas, on the 4th day May A. D. 1903, and which term adjourned on the 27th day of May A. D. 1903, the Hon. Edward R. Meek, United States district judge for the northern district of Texas, presiding, the following proceedings were had, and the following cause came on for trial and was tried, to-wit:

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY } No. 567. In Equity.

2 *Original Petition.*

Filed May 16th, 1901.

STATE OF TEXAS, }
County of Dallas. }

In the District Court of Dallas County, Texas, — Judicial District, —— Term, 1901.

To the honorable judge of said court:

W. S. Kirby, plaintiff, complaining of American Soda Fountain Co., defendant, represents:

That the plaintiff resides in Dallas county, Texas, and that defendant is a corporation duly incorporated, having a local agent named George Sturgis who resides in Dallas county, Texas:

That heretofore, to-wit; on October 26, 1900, the plaintiff was the owner of a certain soda fountain apparatus, located in his store house, in the city of Dallas, of the value of $5000; that on or about said last mentioned date the said defendant, through its said agent, George Sturgis, represented to the plaintiff that defendant had a certain soda fountain apparatus at some distant point which was excellently constructed, of very superior style and appearance, good workmanship and material, exceedingly handsome and much superior both in style and appearance and value, to the said soda fountain apparatus of plaintiff then in operation in his said store house;

That the said soda fountain apparatus of the defendant was not present, nor did plaintiff have an opportunity to inspect the same, and relying upon the statement made to him by defendant, through its said agent, and the warranties of the defendant then made that the said soda fountain apparatus was well made, handsomely finished,

and of very superior style and appearance, workmanship and value, to the soda fountain apparatus of plaintiff, the plaintiff then and there agreed with the defendant to exchange his soda fountain apparatus for the said soda fountain apparatus of the defendant, and to pay the defendant an additional sum in money to
3 cover the represented difference in value between the two sets of apparatus.

That the plaintiff still relying on said representations, delivered his soda fountain to the defendant which now has the same. That the defendant furnished to the plaintiff a soda fountain apparatus and had the same erected in his store house. But after the same was erected, the plaintiff for the first time had an opportunity to and did discover that said soda fountain apparatus furnished by the defendant was not such as it had agreed to furnish under said contract; that same was not of good workmanship, nor well made, nor of superior design and finish and value to that delivered by plaintiff to defendant, but on the contrary, that said soda fountain apparatus furnished by defendant to plaintiff was broken and cracked; not well made no*t* fitted together; was chipped and defaced, and instead of being of imposing appearance and design, was and is small, insignificant looking and unhandsome, and instead of being superior in value to the soda fountain apparatus delivered by plaintiff to the defendant is and was when the same was furnished by plaintiff to defendant of less value than the one furnished by him in the sum of $1500.00. That plaintiff, when he discovered the inferiority of the soda fountain apparatus furnished by defendant to him, notified the defendant of the defects therein and requested the defendant to return him his said soda fountain apparatus and receive back the apparatus furnished by defendant to him, which the defendant refused to do.

That by reason of the premises and the breach by defendant of its agreement to furnish such an apparatus as it contracted to do, plaintiff has been damaged in the sum of $1500.00.

Premises considered, plaintiff prays that defendant be cited
4 and on final hearing plaintiff have judgment against the defendant for his said damages in the sum of $1500.00, and for costs, and for such other and further relief as he may be entitled to.

McCORMICK & SPENCE,
Attorneys for Plaintiff.

Filed May 16, 1901.

H. W. JONES,
Clerk District Court, Dallas Co.,
By ELMO TRIMBLE, *Deputy.*

Citation.

Issued May 18th, 1901.

The State of Texas to the sheriff or any constable of Dallas county, Greeting:

You are hereby commanded to summon American Soda Fountain Company, to appear before the district court of the 14th judicial district of Texas at the next regular term thereof, to be held in the court house in the city of Dallas on the second Monday in September, A. D. 1901, then and there to answer to the petition of W. S. Kirby filed in said court on the 16th day of May, 1901, against the said American Soda Fountain Company, for suit, said suit being numbered 20332, the nature of which demand is as follows, to-wit:

Suit for damages. Plaintiff alleges that on certain representations of one George Sturgis, agent of the defendant, he contracted for the exchange of a certain soda fountain *the* he owned for one owned by defendant; that he was unable to inspect the one owned by defendant until it — put up and he then discovered that said fountain owned by the defendant was not such as had been agreed upon, that it was not of good workmanship, not of superior design to the one owned by plaintiff, but on the contrary it was inferior, broken and cracked, not well fitted together, was chipped and defaced and was insignificant and unhandsome; that plaintiff when he discovered the inferiority of said soda fountain requested the return of his fountain and tendered defendant theirs; that defendant refused to comply with the request of pl'ff; that by reason of the premises plaintiff has been damaged in the sum of $1500.00.

Wherefore he asks judgment of the court for his said damages costs of suit etc., and you will deliver to the said American Soda Fountain Company, a true copy of this citation.

Herein fail not, but have you then and there this writ, showing how you have executed the same.

Witness: H. W. Jones, clerk of the district court of Dallas county.

Given under my hand and seal of office at Dallas, this 18th day of May, 1901.

[L. S.]

H. W. JONES,
Clerk District Court, Dallas County,
By H. H. WILLIAMS, *Deputy.*

Issued this 18th day of May, 1901.

H. W. JONES, *Clerk,*
By H. H. WILLIAMS, *Deputy.*

Sheriff's Return.

Came to hand on the 18th day of May, 1901, and executed on the 20th day of May, 1901, by delivering to American Soda Fountain Company by and through Geo. Sturgis, general agent for said Co., at its office in Dallas, Co., Texas, the within named defendant in person, a true copy of this writ.

J. ROLL JOHNSON,
Sheriff, Dallas County, Texas,
By T. P. SCOTT, *Deputy.*

Fees.

Serving copy.....	$.75
Mileage.....	10
Total.....	$.85

Defendant's Original Answer.

In the District Court, 14th Judicial District, Dallas County, Texas, Sept. Term, A. D. 1901.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN CO. } No. 20332.

6 Now comes the defendant, American Soda Fountain Company, in the above entitled cause, and demurring to plaintiff's original petition filed herein May 15th, 1901, says that the same fails to set up any facts sufficient to constitute any cause of action against this defendant, and of this the defendant prays the judgment of the court, etc.

THOMPSON & THOMPSON,
Att'ys for Defendant.

And for answer in this behalf, the defendant denies all and singular, each and every allegation in plaintiff's petition contained and demands strict proof of the same, and of this *he* puts himself upon the country.

THOMPSON & THOMPSON,
Att'ys for Defendant.

Filed 9 day of Sept. A. D. 1901.

H. W. JONES,
Clerk Dist. Ct., Dallas Co., Tex.,
By W. R. BOWEN, *Deputy.*

Plaintiff's First Amended Original Petition.

Filed Dec. 12th, 1901.

In the District Court of Dallas County, 14th Judicial District of Texas, September Term, 1901.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 20332.

To the honorable judge of said court:

Now comes W. S. Kirby, plaintiff, and having first obtained leave of the court, files this his first amended original petition in lieu of his original petition herein filed May 15th, 1901, and for cause of complaint, plaintiff shows:

That the plaintiff resides in Dallas county, Texas, and that the American Soda Fountain Company, otherwise known as the "Soda Fountain Trust," defendant, is a corporation, duly incorporated, having a local agent named George Sturgis, who resides in Dallas county, Texas.

That, heretofore, to-wit: prior to the 26th day of October, 1900, the plaintiff, who was then a retail druggist doing business
7 in the city of Dallas, was engaged in the reconstruction, remodeling, beautifying and adorning his drug store situated on the corner of Main and Lamar streets, in the city of Dallas, and was then and there in the course of expending a large amount of money in and about the remodeling, beautifying and adorning of his said place of business. That one result of said operation of the plaintiff was to be, that his store room would be double the capacity it had been formerly, and was to be composed of one room, having a frontage on Main street of about 50 feet, and a depth on Lamar street of about 100 feet. That prior to said time plaintiff had been conducting a drug business on the premises, but in a room of 25 feet frontage on Main street, much less handsome than he contemplated making his store house by the improvements aforesaid; all of which was well known to defendant. That the plaintiff then had and owned a soda fountain apparatus of large capacity well-made and handsome in appearance, which was then of about the value of $4000.00. That while plaintiff was engaged in the re-construction of his business house as aforesaid, the defendant, acting through its agent, George Sturgis, approached the plaintiff and falsely and fraudulently for the purpose of inducing plaintiff to enter into the hereinafter mentioned contract with defendant, represented to the plaintiff that the defendant then had at or near the city of Boston, in the State of Massachusetts, a soda fountain

apparatus which was of the very best construction and worth
thousand and twenty five dollars more than the plaintiff's s
fountain apparatus (which was then present and had been ex
ined by the said Sturgis); and that said soda fountain apparatu
defendant was so constructed that the same would deliver s
water through the faucets thereof at a temperature of 33 deg
Fahrenheit; that the said apparatus which defendant then had
the only one which had ever been constructed; that it was in
city of Boston, or near there, and that he (Sturgis) had
8 cently seen and examined the said apparatus; and that s
apparatus of defendant, by reason of its great beauty, wo
be satisfactory to plaintiff as an ornament to his new store.

Plaintiff avers that he relied on said statements and represe
tions made by the defendant through its said agent, Sturgis,
was ignorant of the falsity thereof, but that the said representati
were then false and fraudulent, and known by the said Sturgi
be false and fraudulent, in this:

That the said soda fountain apparatus of the defendant was
of the very best material, but was what is known as "second"
was not worth two thousand and twenty-five dollars more than
soda fountain apparatus of the plaintiff with which he (plaint
and the said defendant, through its agent, Sturgis, also was famil
and that said soda fountain apparatus of defendant would not
liver soda water through its faucets at a temperature of 33 deg
Fahrenheit, and would not be satisfactory to plaintiff on accoun
its beauty as an ornament to his store. And the said Sturgis t
well knew that the said soda fountain apparatus of defendant
not worth as much as the soda fountain apparatus of the plain
and also then and there well knew that the soda fountain appara
of the defendant would not deliver soda water through its fau
at a temperature lower than about 40 degrees Fahrenheit, and
knew that same would not be satisfactory to plaintiff as an or
ment as aforesaid.

Plaintiff further avers that, relying on said representations m
by the defendant through its said agent, Sturgis, the plaintiff agr
with the defendant to exchange his (the plaintiff's) soda fount
apparatus for the soda fountain apparatus of the defendant, and
pay to the defendant in money, $2025.00 in addition. And the
fendant then warranted to the plaintiff that its said soda fount
apparatus was worth two thousand and twenty-five doll
9 more than the soda fountain apparatus of the plaintiff, a
was constructed of the very best materials. And that its s
soda fountain apparatus would deliver soda water through its f
cets at a temp-ature of 33 degrees Fahrenheit; and that its s
soda fountain apparatus would be, in style, quality and appe
ance, satisfactory to the plaintiff as an ornament and adornment
his said drug store. And in addition thereto that its said so
fountain apparatus should be well constructed, made of go
sound, first-class materials and well put together. And that

defendant further agreed with the plaintiff to set said soda fountain apparatus up in the store of the said plaintiff, at its own cost, and to deliver to the plaintiff a carbonating apparatus at a further cost of, to-wit $325.00 (which was afterwards delivered to plaintiff and paid for).

That the said defendant undertook to make a memorandum of a part of the transaction between plaintiff and defendant in writing on one of its order blanks containing a great deal of printed matter in small type, for the signature of the plaintiff, which order blank was not adapted for writing in the warranties, which defendant had made to the plaintiff, and which order blank is simply an informal memorandum and does not purport to contain all the terms of the contract between the plaintiff and the defendant made and entered into as aforesaid. Or, if plaintiff was mistaken in this, then he alleged that the defendant fraudulently or by mistake, omitted from the said contract many of the most material parts thereof, viz; the warranties aforesaid; the agreement as to the exchange of fountain aforesaid, and the purchase and sale of said carbonatin g machine aforesaid, and represented to the plaintiff that the said order was simply a memorandum as to the payment of the $2025.00 aforesaid, and the security therefor; and the plaintiff relying on the fact that the said order did not contain or purport to contain all the agreements between the parties, signed the same without reading the said order in full. And plaintiff avers that the said agreements and stipulations between the plaintiff and defendant as to the exchange of soda fountain apparatus and the warranties of defendant, and the sale of said carbonating machine and the payment of the balance by plaintiff to defendant and the lien therefor were made verbally, and only a part thereof was intended to be put in writing that is to say, the part thereof relating to the payment of said $2025.00 and the retention of a lien on the apparatus to be delivered by the defendant to plaintiff for the payment thereof, and that neither the plaintiff nor the defendant understood then that said memorandum signed by the plaintiff, represented the entire contract entered into between the plaintiff and the defendant, and that plaintiff never was notified by defendant of its acceptance or any written contract between them.

Plaintiff further represents that the defendant received from the plaintiff his soda fountain apparatus and moved the same away from plaintiff's place of business before it delivered its soda fountain apparatus to plaintiff, and has converted the same to its, the defendant's own use and benefit, and that the said soda fountain apparatus delivered by the plaintiff to the defendant under the said contract, then and there was of the value of $4000.00. That afterwards, the defendant shipped to the plaintiff, at Dallas, a soda fountain apparatus and had the same set up in plaintiff's drug store when for the first time he had opportunity to examine the said soda fountain apparatus, and could not then examine the same

until it was fully set up. That after the said soda fountain was erected by defendant in plaintiff's store, the plaintiff for the first time had an opportunity to examine the same, and then discovered that the same was not such an apparatus as the defendant had represented it would be and had
11 agreed and bound itself to furnish to the plaintiff under said contract, in that, *in that* the said soda fountain apparatus so furnished by the defendant to the plaintiff would not deliver soda water at a temp-ature below 40 degrees Fahrenheit and was chipped and defaced and cracked and illy joined together, and was not of good workmanship nor material, nor well made, nor of a superior design and finish, but insignificant looking and unhandsome looking in style and beauty as an ornament, and instead of being superior in value by $2025.00 to the soda fountain apparatus delivered by the plaintiff to the defendant, was, as a matter of fact of less value than the same, in the sum of at least, $2500.00, and was not satisfactory to plaintiff as an ornament to his store. That plaintiff, when he discovered the inferiority of the soda fountain apparatus furnished by the defendant to him, notified the defendant of his dissatisfaction therewith and requested the defendant to return to him (the plaintiff) the said soda fountain apparatus which he had delivered to it and which the defendant then had on hand, and receive back the apparatus furnished by defendant to plaintiff, which the defendant refused to do. Plaintiff further represents that so far as capacity and actual utility *was* concerned, the soda fountain apparatus which he had prior to his entering into this contract with the defendants was reasonably equal to the demands of his business, and fully equal to the apparatus which the defendant agreed to furnish to plaintiff under said contract and that the only inducement moving *to* plaintiff to enter into the contract with the defendant for a new apparatus was that he might with said new apparatus more effectually and completely than with his old one beautify and adorn and render attractive his drug store, and that it would be worth *an* account of these excessences $2025.00 more than plaintiff's old apparatus, which fact was well known to the defendant when said contract was entered into, and was fully discussed between the plaintiff and the defendant's said agent.

12 Plaintiff further avers that on account of the failure of said machine and apparatus furnished by the defendant to the plaintiff to exceed, or even to equal in beauty and general appearance as an ornament to his store, the soda fountain apparatus which he delivered to the defendant in exchange therefor, the said apparatus so received by him was not satisfactory to the plaintiff as an ornamental piece of furniture and ought not to have been satisfactory to him. And in addition, said apparatus was defective as hereinbefore set out, and thereby failed to conform to the said representations and warranties.

Plaintiff further represents that the defendant has put it beyond its power to return to the plaintiff the soda fountain apparatus de-

livered by him to it on account of the defendant's having sold the same. Plaintiff further represents that the soda fountain apparatus delivered by the defendant to the plaintiff was not, when so delivered, and is not now, worth more than the sum of $1500.00. And by occasion of the exchange effected through the fraudulent and deceitful conduct of the defendant, and on account of the inferior apparatus furnished by the defendant to the plaintiff as aforesaid the defendant has become liable and promised to pay to the plaintiff the sum of $2500.00. But though payment thereof has been demanded by plaintiff of the defendant, the defendant has wholly failed to pay the same or any part thereof, to plaintiff's great damage in the said sum of $2500.00.

Wherefore, premises considered, and defendant having heretofore been cited and having answered herein, plaintiff prays that this obligation to pay the defendant $2025.00 difference according to said contract be cancelled, and that the plaintiff have and recover of the defendant the sum of $2500.00 damages, and costs, and such other and further relief as he may be entitled to in the premises.

McCORMICK & SPENCE,
Att'ys for Plaintiff.

13 Filed 12 day of Dec. A. D. 1901,

H. W. JONES,
Clerk Dist. Ct., Dallas Co., Texas,
By W. R. BOWEN, *Deputy.*

Petition for Removal to U. S. Circuit Court, Fifth Circuit and Northern District of Texas.

Filed January 22nd, 1902.

In District Court, 14th Judicial District, Dallas County, Texas, December Term, A. D. 1901.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 20332.

To the honorable district court, 14th judicial district, Dallas county, Texas:

Your petitioner American Soda Fountain Company, defendant in the above entitled cause, respectfully shows to this honorable court that the matter and amount in dispute in the above entitled cause exceeds the sum or value of two thousand dollars, exclusive of interest and costs; that by his first amended original petition filed herein December 12th 1901, and at the present term of this honorable court, the plaintiff increased his demand from fifteen

hundred dollars to twenty-five hundred dollars; that this suit is of a civil nature, plaintiff's action being for damages for breach of contract and for failure of warranty. That the controversy in said suit is, and at the time of the commencement of this suit was, wholly between citizens of different States, and that your petitioner, defendant in the above entitled suit was, at the time of the commencement of this suit, and still is, a private corporation duly incorporated under the laws of the State of New Jersey, and is an inhabitant and resident of and citizen of the State of New Jersey, and a non-resident of the State of Texas, and that the plaintiff, W. S. Kirby, was, at the time of the institution of this suit, and still is a resi-
14 dent of and a citizen of the city and county of Dallas, and State of Texas.

And your petitioner offers herewith a good and sufficient surety for *his* entering in the circuit court of the United States, for the northern district of Texas, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded in said circuit court of the United States, if said court should hold that this suit was wrongfully or improperly removed thereto. And *he* prays this honorable court to proceed no further herein excepting to make the order of removal required by law and to accept the said surety and bond and cause the record herein to be removed into said circuit court of the United States in and for the northern district of Texas, and *he* will ever pray.

AMERICAN SODA FOUNTAIN CO.,
By J. W. THOMPSON, *Att'y.*

THOMPSON & THOMPSON,
Attorneys for Petitioners,
American Soda Fountain Co.

THE STATE OF TEXAS, }
County of Dallas. }

I, J. W. Thompson, being duly sworn, do say that I am a member of the firm of Thompson & Thompson, attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

J. W. THOMPSON.

Subscribed by said J. W. Thompson in my presence, and by him sworn to before me this the 22 day of January, A. D. 1902.

H. W. JONES,
Cl'k Dist. Court, Dallas Co.,
[L. S.] By W. R. BOWEN, *Dep.*

Filed 22 day of Jan. A. D. 1902.

H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By R. W. BOWEN, *Deputy.*

15 *Bond for Removal to U. S. Circuit Court.*

District Court, 14th Judicial District, Dallas County, Texas.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 20332.

Know all men by these presents: That *I*, American Soda Fountain Company, as principal, and —— —— as sureties, are held and firmly bound unto W. S. Kirby in the penal sum of five hundred ($500.00) dollars, for the payment whereof well and truly to be made unto the said W. S. Kirby his heirs, and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents:

Yet, upon these conditions: The said The American Soda Fountain Company having petitioned the district court of the 14th judicial district, Dallas county, Texas, for the removal of a certain cause therein pending, wherein W. S. Kirby is plaintiff and The American Soda Fountain Company defendant, to the circuit court of the United States in and for the fifth circuit and northern district of Texas, at Dallas.

Now if the said The American Soda Fountain Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 22 day of Jan. A. D. 1902.

AMERICAN SODA FOUNTAIN CO.,
By J. W. THOMPSON.
EDW. O. TENISON,
C. R. BUDDY.

Approved:

T. F. NASH, *Dist. Judge.*

Filed 22 day of Jan. A. D. 1902.

H. W. JONES,
Clerk Dist. Ct., Dallas Co., Tex.,
By W. R. BOWEN, *Deputy.*

16 *Order of Removal.*

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN CO. } 20332.

FEBRUARY 3RD, 1902.

This cause coming on this day to be heard upon the petition of American Soda Fountain Company to remove same to the circuit court of the United States for the northern district of Texas, said petition being heard by the court and it appearing that a good and sufficient bond has been filed, and that said petition shows grounds for removal, the prayer of the said American Soda Fountain Company is granted, and its bond approved, and this cause ordered removed to the circuit court of the United States for the northern district of Texas and the clerk of this court will make out a transcript of the record in this cause to be filed in the United States court for the said district of Texas.

Bill of Costs.

Filing petition and docketing		35
Issuing citation and copy	1	25
Sheriff Johnson serving citation		85
Filing answer and entering appearance		30
Jury fee paid by pl'ff	5	00
Franting plaintiff leave to amend		75
Filing 1st amended original petition		15
Granting plaintiff leave to amend		75
Plaintiff demands a jury		75
Filing int'ys to Geo. H. Clapp *et al.*, def't		15
Filing X int'ys to Geo. H. Clapp *et al.*, pl'ff		15
Issuing comm. to Geo. H. Clapp *et al.*, def't		75
Taking affidavit of def't's att'y		50
Filing bond for removal		15
Filing petition for removal		15
Entering order of removal	1	00
17 Making transcript for removal, def't	7	35
Taxing costs, def't		25
	$20	60

Clerk's Certificate.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN CO. } No. 20332.

THE STATE OF TEXAS, }
County of Dallas. }

I, H. W. Jones, clerk, district courts, Dallas county, Texas do hereby certify that the foregoing 14 pages contain a true and correct transcript of all the proceedings had in the above numbered and entitled cause (with the exception of the deposition of Geo. H. Clapp *et al.*) as the same now appear of record and on file in my office.

Given under my hand and seal of office, at Dallas, this the 10th day of February, A. D. 1902.

H. W. JONES,
Clerk District Court, Dallas County, Texas,
[SEAL.] By ELMO TRIMBLE, *Deputy.*

Endorsed as follows: No. 567 In eq. W. S. Kirby *vs.* American Soda Fountain Company, Filed 12 day of May 1902 J. H. Finks, clerk. By W. A. Porter, deputy.

18 *Demurrer, Answer, and Cross-complaint of American Soda Fountain Company.*

In the Circuit Court of the United States, Fifth Circuit and Northern District of Texas, at Dallas.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } In Equity.

The demurrer of American Soda Fountain Company, defendant, to the first amended original bill of complaint of W. S. Kirby, complainant, filed in the State court December 12th, 1901.

This defendant, American Soda Fountain Company, by protestation, not confessing or acknowledging all or any of the matters or things the said bill of complaint contains to be true in such manner and form as the same are set forth and alleged, demurs to said bill, and for cause of demurrer says:

1.

That the defendant's residence or place of abode is not stated in said bill.

2.

That said bill is deficient in certainty in this; that it does not state under the laws of what State, or under what laws the defendant is incorporated or has any legal existence, or of what State the defendant is a citizen.

3.

That all allegations in said bill in reference to plaintiff enlarging, adorning and beautifying his store are impertinent, and should be stricken from said bill.

4.

That the plaintiff has not in, or by the said bill, made or stated such a cause of action as doth or ought to entitle him to any such relief as is thereby sought or prayed for from or against this
19 defendant.

And for further grounds of demurrer to be stated upon a hearing hereof.

Wherefore, this defendant demands the judgment of this honorable court, whether it shall be compelled to make any further answer to the said bill or to any of the matters or things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

THOMPSON & THOMPSON,
Solicitors and Counsel for Defendant, American Soda Fountain Company.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

J. W. THOMPSON,
Of Counsel for the Defendant.

THE STATE OF TEXAS, }
County of Dallas. }

J. W. Thompson, being first duly sworn, deposes and says: I am att'y and counsel for The American Soda Fountain Company the above named defendant. The foregoing demurrer is not interposed for delay. This affidavit is made by said J. W. Thompson for the reason that the defendant is out of the district.

J. W. THOMPSON.

Sworn to and subscribed before me this the 12th day of May by J. W. Thompson.

D. W. BOWSER,
[SEAL.] *Notary Public, Dallas County, Texas.*

Answer.

The answer of The American Soda Fountain Company, defendant.

And the said American Soda Fountain Company, not waiving its said several demurrers, but wholly relying and insisting
20 thereon, in answer to so much of said bill as it is advised it is material and necessary for it to answer, says as follows:

1.

Defendant says that its correct and legal name is American Soda Fountain Company, and denies that it is known as the "Soda Fountain Trust," and denies that George Sturges is and was its local agent.

2.

Defendant denies that on the 26th, day of October 1900, the plaintiff was the owner of a soda fountain apparatus of large capacity, well made and handsome in appearance, which was then of about the value of four thousand dollars.

Defendant alleges the facts to be; that said soda fountain apparatus of the plaintiff was second hand when plaintiff acquired the same, and had been in use for more than six years prior to October 26th, 1900, and then was not of a value exceeding $1100.00, and when new was not worth exceeding $2,500.00.

3.

This defendant denies that it, acting through George Sturges, or through any agent, approached the plaintiff and fraudulently and falsely, for the purpose of inducing plaintiff to enter into the contract mentioned in plaintiff's complaint, represented to the plaintiff that the defendant then had at or near the city of Boston, in the State of Massachusetts a soda fountain apparatus, which was of the very best construction, and well worth two thousand and twenty-five dollars more than plaintiff's soda fountain apparatus, and that said soda fountain apparatus of the defendant was so constructed that the same would deliver soda water through the faucets thereof at a temperature of 33 degrees Fahrenheit; that the said apparatus which the defendant then had was the only one which had ever been constructed; that it was in the city of Boston or near there, and that he, Sturges, had recently seen or examined the
21 same and that said apparatus of defendant's by reason of its great beauty, would be satisfactory to plaintiff as an ornament to his new store.

Defendant alleges the facts to be that the plaintiff, on or about October 26th, 1900, wished to purchase a new soda fountain apparatus and called upon George Sturges, that the defendant, acting

through its salesman, the said George Sturges, exhibited to the plaintiff descriptions, designs and photographs of machines manufactured and sold by the defendant; that from the descriptions, designs and photographs, the plaintiff, who had been in the drug business for many years, and who was familiar with soda fountains, selected the apparatus he wished to purchase with the difference that he wished the machine to be of larger capacity than that represented by the photographs, but in other respects, as to the quality, style and apparatus, the same, The said Sturgis then and there represented to the plaintiff that the size of machine he wished, was not carried by the defendant in stock, but was of an extra size, which defendant would manufacture and ship to plaintiff; that the machine so selected by the plaintiff was what is known as Special Versailles, onyx with W & G top meaning white and gold top, with 22 syrup faucets, 3 soda draught tubes and four (4) mineral draught tubes; that the price agreed upon by the plaintiff and the defendant, acting through the said Sturges, for said machine and for a constant carbonate of 220 volts with pipes and connections and the attachments and furnishings freight and setting up at Dallas was $3,219.00; that the defendant agreed to take plaintiff's old machine in part payment for the new purchase and allow the plaintiff credit on said sale for the sum of $1,194.00 for the same, leaving the balance due the defendant of two thousand and twenty-five ($2,025.00) dollars; that thereupon, on October 26th, 22 1900, plaintiff executed a written order and contract for said Vercailles apparatus, carbonater, etc, etc, in which written instrument plaintiff agreed to pay defendant two thousand and twenty-five dollars for said property delivered and set up in plaintiff's store at Dallas, Texas, as follows: One hundred dollars, ($100.00) on receipt of bill of lading of goods, and the balance in thirty-six (36) equal monthly payments beginning April 1st, 1901 with interest at 5 per cent. per annum from April 1, 1901, and to execute notes therefor, that said written order and contract of date October 26th 1900, stipulated for and retained a mortgage lien upon said apparatus, carbonater &c., to secure the payment of the said sum of two thousand and twenty-five dollars, a copy of said written order and contract is hereto attached, marked "Exhibit A" and made a part hereof and contains the contract and agreement made and entered into by and between the plaintiff and the defendant. And said contract states on its face that there are no other conditions or agreements in reference to said sale except those stated in said contract, and that no claims will be made by the plaintiff for anything not specified therein. That defendant manufactured said special machine according to the terms of the contract between plaintiff and defendant, and shipped said goods on or about February 8th, 1901, and soon thereafter set up said apparatus in plaintiff's store, as it had agreed to do, and in all things fully complied with its said contract; that the plaintiff paid the defendant the sum of three hundred and twenty-five ($325.00) dollars when

said machine and carbonater were placed and set up in his store, but has failed and refused further to comply with his contract or to pay defendant any and further additional sums of money; that defendant has attached hereto a statement marked "Exhibit B" showing the goods ordered by plaintiff, and shipped by defendant,
23 as hereinbefore stated together with the prices and respective values thereof.

4.

Defendant denies that it warranted to the plaintiff that its said soda fountain apparatus was worth two thousand and twenty-five dollars more than the soda fountain apparatus of the plaintiff and was constructed of the very best material and that its said soda fountain apparatus would deliver soda water through its faucets at a temp-ature of thirty-three (33°) degrees Fahrenheit, and that said soda fountain apparatus would be in style, quality and appearance satisfactory to plaintiff as an ornament and adornment to his drug store, and in addition thereto would be well constructed and made of good, first-class material and well put together.

5.

Defendant denies that it fraudulently or by mistake omitted from said contract many of the most material parts thereof, namely; the warranties, as set out in the above paragraph of this answer, the agreement as to the exchange of fountains, and the purchase and sale of said carbonating machine aforesaid. And denies that it represented to the plaintiff that said order was simply a memorandum as to the payment of the two thousand and twenty-five dollars, aforesaid and the security therefor. Defendant avers the facts to be that the plaintiff had every opportunity to examine the written contract and did so examine it and was familiar with its contents and stipulations, and both the plaintiff and the defendant understood that said writing represented the contract between them.

6.

Defendant denies that the said soda fountain apparatus so manufactured and shipped by defendant to the plaintiff was not of the
24 very best material, but was what was known as "second," and said defendant alleges the facts to be that said apparatus was of the very best material, was handsome, in appearance, was skillfully put together, and was, together with the other goods called for in said contract with the freight and setting up expenses of the value of $3,219.00, and that the soda fountain apparatus so manufactured by defendant, together with the other goods called for in said order, exceeded in value the worth of the plaintiff's apparatus by at least the sum of two thousand and twenty-five dollars.

7.

Defendant denies all of the allegations of fraud, and fraudulent representations and deceitful practices contained in plaintiff's said bill, and says: that all allegations in said bill of complaint charging fraudulent and deceitful representations and practice on the part of the said Sturges, as to the character, kind, quality and description of either or both of said soda fountain apparatuses, as to the terms of sale, as to the warranties, and as to the execution of the contract by the plaintiff, are wholly false and untrue, and that the plaintiff knows them to be false and untrue.

8.

Defendant further alleges that it manufactured and shipped to the plaintiff a special Versailles onyx apparatus with white and gold top, with 22 syrup faucets, 3 soda dra-ght tubes, 4 mineral draught tubes and other attachments and furnishings and also one constant carbonater with pipes and connections; that the value of said apparatus, attachments etc., set up in complainant's store was of the value of $3,219.00, and was so represented by the said Sturges to the plaintiff, that plaintiff's machine was old and second hand, and was of the value of not exceeding $1,100.00 that defendant, acting through its salesman, Sturges, and the plaintiff agreed upon the values of said respective apparatus and attachments; that the contract was reduced to writing and signed by the plaintiff, a copy of which is hereto attached, marked "Exhibit A" and made a part of this answer.

Defendant denies that it fraudulently or by mistake omitted from said contract many of the most important parts thereof, namely; the warranties, aforesaid, the agreement as to the exchange of fountains aforesaid and the purchase and sale of the said carbonating machine aforesaid, and represented to the plaintiff that the order was simply a memorandum as to the payment of the two thousand and twenty-five dollars aforesaid and the security thereof. Defendant says that the price of the plaintiff's machine was agreed upon, and that defendant received said old machine from the plaintiff and allowed him a credit of $1,194.00 upon his said purchase, and that thereupon the plaintiff signed the written order marked "Exhibit A" wherein and whereby he agreed to pay to said defendant said sum of two thousand and twenty-five dollars, as per the terms of said contract hereinbefore set out and hereto attached.

9.

Defendant says that the apparatus so selected and ordered by the plaintiff was manufactured and shipped by defendant and set up in plaintiff's store according to contract, and defendant denies that said apparatus was not as the defendant had represented it would be, and had agreed and bound itself to furnish to the plaintiff under

the said contract; that said machine was not chipped, or cracked or defaced or illy joined together, or of bad workmanship or material, but was of good workmanship and material, or superior design and finish and handsome in style and beauty and would deliver soda water through its faucets at a temp-ature less than 40° Farh., and was, with the carbonater and other goods of value exceeding by two thousand and twenty-five dollars the soda fountain apparatus delivered by plaintiff to the defendant; that in setting up said
26 machine, a small tool was accidentally dropped, made a small insignificant chip, which defendant then and there agreed to remove or to allow for, and is still ready so to do.

Defendant denies that said soda fountain apparatus attachments, etc., *was* of less value by twenty-five hundred dollars than the soda fountain apparatus of plaintiff, but defendant alleges the facts to be that the said soda fountain apparatus attachments etc., set out in "Exhibit A" hereto attached exceeded in value the apparatus of the plaintiff by at least the sum of two thousand and twenty-five dollars.

10.

Defendant denies that the plaintiff ever requested it to return to him the soda fountain apparatus, which he had delivered to the defendant and receive back the apparatus furnished by the defendant to plaintiff until long after plaintiff had received said apparatus; that said apparatus was delivered and set up in plaintiff's store about the middle of March, 1901; that plaintiff used said machine until about the middle of May, 1901, and then offered to return the same and take back his old fountain; that by this time, the defendant had disposed of his old fountain it had received from plaintiff, which fact the plaintiff well knew when he made said offer.

Defendant denies that so far as capacity and actual utility was concerned, the soda fountain apparatus, which plaintiff had prior to his entering into the contract with the defendant, was fully equal to the apparatus, which defendant agreed to furnish the plaintiff and did furnish the plaintiff under said contract.

11.

The defendant denies that the apparatus so delivered by it to the plaintiff is not worth more than the sum of fifteen hundred dollars, and denies that any exchange was effected through fraudu-
27 lent representations and deceitful conduct of the defendant, and denies that the defendant is indebted to the plaintiff in the sum of twenty-five hundred dollars, as claimed in plaintiff's complaint, or in any other amount.

Defendant further alleges that the plaintiff is justly indebted to the defendant in the sum of two thousand and twenty-five dollars, less a credit of three hundred and twenty-five dollars paid on said contract; that to secure said balance defendant has a mortgage lien

upon said soda fountain apparatus and carbonater with their attachments, etc., etc.,

Wherefore, the premises considered, defendant says that plaintiff should take nothing by his said suit, and prays for judgment over and against the plaintiff for the sum of seventeen hundred dollars, and for foreclosure of its mortgage lien and for costs of suit, etc., etc., as in duty bound, the defendant will ever pray.

AMERICAN SODA FOUNTAIN COMPANY,
By J. W. THOMPSON, *Its Attorney and Counsel.*

THOMPSON & THOMPSON,
Solicitors & Counsel for Defendant,
American Soda Fountain Company.

THE STATE OF TEXAS, }
County of Dallas. }

Before me, D. W. Bowser, a notary public within and for the county of Dallas, State of Texas, on this day personally appeared George Sturges, who, being by me duly sworn, says on oath: My name is George Sturges; I am the George Sturges referred to in the bill of complaint and in the above and foregoing answer and am and was on October 26th, 1900., the representative and salesman for American Soda Fountain Company, defendant, and made the sale referred to in the above answer to the plaintiff's com-
28 plaint, and know all the terms stipulations and conditions thereof. I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge, excepting as to matters stated on information and belief, and, as to those, I believe them to be true.

I make this affidavit because I have a personal knowledge of all the facts, and because the American Soda Fountain Company is a citizen and an inhabitant of the State of Massachusetts and is out of this district.

GEO. STURGES.

Sworn to and subscribed before me by George Sturges, this the 12th day of May, A. D. 1902.

[SEAL.]

D. W. BOWSER,
Notary Public, Dallas Co., Texas.

"EXHIBIT "A."

Salesman George Sturges.

DALLAS, TEXAS, *Oct. 26th*, 1900.

American Soda Fountain Co., Boston, Mass.:

Forward the following described soda water apparatus, and upon receipt of bill of lading or tender of goods I will honor sight draft

or other demand for $100 and the balance I promise to pay in monthly sums as follows 36 equal payments beginning April 1st 1901, interest from Apr. 1st, 1901 with interest at 5 per cent. from date of shipment, with each payment, and for such balance and interest will execute and deliver contract notes of like tenor and form to the one printed on the back of this order, and maturing as above set forth and will execute such other papers as may be necessary under the laws of the State to protect the title of American Soda Fountain Co., against all third parties. I agree to insure said apparatus for $—, the loss, if any, payable to American Soda Fountain Co., as its interest may appear, and to keep the same insured
29 until all payments are made. The delivery of such apparatus &c., to be conditional upon compliance with the above terms and conditions, and said apparatus to remain the property of American Soda Fountain Co. till paid for.

In case American Soda Fountain Co., is to take any second hand soda water apparatus in exchange, the undersigned warrants it free from all liens, and agree to put such apparatus in as good condition as possible and pack and ship it as directed by said American Soda Fountain Co.

Description of apparatus? State name of apparatus and varieties of marbles. Also wood and finish of top. Special Versailles onyx & W. & G. top. 1 constant carbonator 220 volts 10 ft. supply to conn. app.:

Size of apparatus. State number syrup faucets and draught tubes required. 22 syrup faucets, 3 soda draught tubes 4 mineral draught tubes. Prices. Apparatus $— carbonator — generator, — fountains — tumbler washer — tumbler holders — tumblers — marble slabs — pipe — juices. — $2025.

Mineral water name plates (check those wanted) Kissengen, vichy, seltzer, pavilion, Congress, Peruvian beer, Ottawa beer, ginger ale, ale, root beer, spear beer. Syrup name plates (check those wanted) Lemon, vanilla, sarsaparilla, pineapple orange, ginger, orgeat, strawberry, raspberry ambrosia, coffee cream, tonic, hock, claret, nectar, rose, chocalate, blackberry, don't care, maple, wild cherry, catawba, sherbet, winter green, bananna, plain, checkerberry, tea.

Length of supply pipe. Pipe is furnished extending two feet under the counter. If more is wanted the price is fifteen cents per foot. State length of each supply pipe from bottom of apparatus. Also whether a pipe coupling or the fountain clamp joint is required.
No. clamps will be furnished with either apparatus or fountain
30 unless specified on order. Necessary clamps will be sent without charge with apparatus when so specified, not exceeding one for each draught. 1–50 ft. supply M. & F. M. f- clamp — constant carbonator — volts (if alternating current give voltage at point of installation) — cycles, — phases — reliable carbonator — lbs. city water pressurem — liquified gas outfit No —. — No. — generator — fountains. 24 No. j tumbler holders — No —

tumblers 24–7 in spoons — — No. — tumbler washer. — tumbler drainer — change stands. 1–1925 pitchers 1–1879 bowls 1–1925 spoon holders — syrup sbottles — shakers — trays — crushed fruit bowl — two way cock, — ice shaver — lemon squeezer.

1 base marble slab, — dispensing slab. (Give exact diagram on separate sheet indicating how the edges are to be finished and where apparatus is to be placed. State on paper diagram which is the upper side.

Juices &c. 2 silver lids 1–1169 straw vase.

Transportation (avoid lines requiring reshipment if possible When shipped: Mention the date, (if possible, that delays in transportation may be obviated. Morgan line as soon as possible. Freight and setting up charges to be paid by consignee.

This order cannot be countermanded and this is fully understood by the signer. There are no other conditions or agreements with your salesman except those herein stated, and no claim will be made by me for anything not specified herein.

Name of bank to which papers are to be sent for collection: ——

W. S. KIRBY.

(Write name and send business card.)

References: App. & earb. to be put up in store at price sold.

Exhibit "A."

30½ $—. —— —, 190–.

For value received, —— after date —— promise to pay to the order of American Soda Fountain Co. —— dollars with interest at 6% ——. The consideration of this and other notes is certain soda water apparatus and appurtenances described in contract between —— —— and the said American Soda Fountain Co., bearing date —— and which —— have received of said American Soda Fountain Co.

Nevertheless it is understood and agreed by and between —— —— and the said American Soda Fountain Co., that the title to the above mentioned property does not pass to —— —— and that until all said notes are paid the title to the aforesaid property shall remain in the said American Soda Fountain Co. which shall have the right, in case of non-payment at maturity of either of said notes without process of law, to enter and retake, and may enter and retake immediate possession of the said property, whereever it may be, and remove the same.

Payable at the —— bank.

—— ——.

Due ——.

31 "EXHIBIT B."

1 special Versailles onyx soda fountain apparatus, W. & G. top	$2,620.00
1 marble base slab	45.50
2 dozen J. tumbler holders	24.00
2 dozen bar spoons, 7 inch	10.00
1 # 1925 spoon holder	2.75
1 # 1169 straw vase	2.25
1 # 1899 sugar bowl	6.00
2 silver lids	20.00
1 50 feet B. T. supply pipe	7.50
1 # 1925 two quart cream pitchers	6.00
Freight and setting up expanses	150.00
	$2,894.00
1 constant carbonator, 220 volts, 10 feet supply to connect with apparatus	325.00
	$3,219.00

Cross-complaint.

Cross-complaint of American Soda Fountain Company.

For cross-complaint and for affirmative relief, your orator shows to the honorable judges of the circuit court of the United States in and for the northern district of Texas, at Dallas.

First. That your orator is a private corporation duly organized and existing under the laws of the State of New Jersey, and that it is an inhabitant and citizen of said State; that its name is American Soda Fountain Company; that it comes into court at the suit of W. S. Kirby, who is a citizen of the State of Texas, and resides in Dallas county in said State of Texas.

Second. That heretofore, to-wit on the 12th day of December, 1901, the said W. S. Kirby filed his first amended petition
32 in the district court of the 14th judicial district of Texas, complaining of your orator, and alleging in substance that on or about the 26th day of October, 1900, he made and entered into a contract with your orator, acting through its agent, George Sturges, by the terms of which he agreed to exchange a soda fountain apparatus, which he then had in his store at Dallas, Texas, for a soda fountain apparatus of your orator which was then in or near the city of Boston, in the State of Massachusetts; that by the false and fraudulent representations and the warranties of the said Sturges, he, Kirby, was persuaded and induced to make said exchange and to agree to pay your orator the sum of two thousand and twenty-

five, ($2,025.00) dollars in addition to his apparatus, and signed a written obligation to pay said $2,025.00; that the apparatus delivered to him, by your orator was not as represented and warranted by the said Sturges, and instead of being worth $2,025.00 more than his, Kirby's, apparatus was really worth twenty-five hundred ($2,500.00) dollars less,—complainant's apparatus being of the value of four thousand, ($4,000.00) dollars and your orator's apparatus being of the value of only $1,500.00; and that complainant was thereby damaged in the sum of twenty-five hundred dollars.

Complainant, in said bill, prays for the cancellation of his written obligation to pay your orator $2,025.00; for the recovery of twenty-five hundred dollars damages, the difference in the value of the two apparatuses, for costs, and for such other and further relief as he may be entitled to. All of which allegations your orator denied, and now expressly denies: That said cause was, afterwards, by your orator, removed into this honorable court.

3.

Your orator complaining of said W. S. Kirby, complainant, says; that on or about the 26th day of October 1900, complain-
33 ant, called upon and approached your orator's salesman, George Sturges, for the avowed purpose of purchasing a new soda fountain apparatus for his drug store, at Dallas, Texas, that your orator, through its salesman George Sturges, exhibited to complainant descriptions, designs and photographs of soda fountain apparatus manufactured and sold by your orator and informed him of the prices thereof; that from said descriptions, designs and photographs the complainant, who had been in the drug business for many years and who was familiar with soda fountain apparatuses, selected an apparatus, with the difference that he desired said apparatus to be of larger capacity than that represented by the photograph but in other respects, as to the quality, style and workmanship and appearance, to be the same as the photograph. The said Sturges, then and there represented to the complainant that the apparatus he had selected, being an extra size, was not carried by your orator in stock, but would have to be manufactured by it and shipped to complainant; that the machine so selected and purchased by the complainant was what was known as a special Versailles onyx with W. & G. top (meaning white and gold top) with 22 syrup faucets, 3 soda draught tubes and 4 mineral draught tubes; that the price and fair market value of said apparatus was $2,620.00; that in addition to said apparatus, the complainant ordered and purchased of your orator other goods, attachments, furnishings, etc., which your orator agreed to deliver at complainant's store, in Dallas, Texas, and set up and adjust said apparatus for the total sum of three thousand, two hundred and nineteen ($3,219.00) dollars. A list of said goods with the prices thereof is as follows:

34	1 special Versailles onyx soda fountain apparatus W. & G. top	$2,620.00
	1 marble base slab	45.50
	2 dozen J. tumbler holders	24.00
	2 dozen bar spoons, 7 inch	10.00
	1 #1925 spoon holder	2.75
	1 #1169 straw vase	2.25
	1 #1879 sugar bowl	6.00
	2 silver lids	20.00
	1 50 foot B. T. supply pipe	7.50
	1 #1925 two quart cream pitcher	6.00
	Freight and setting up expenses	150.00
		$2,894.00
	1 constant acrbonator, 220 volts, 10 foot supply to connect with apparatus	325.00
		$3,219.00

That the complainant had on hand an old soda fountain apparatus which had been in use some six or seven years, and was second-hand when complainant acquired the same, and, when new was not worth exceeding twenty-five hundred dollars, ($2500.00) *dollars*, and in its then present condition was not worth exceeding eleven hundred, ($1100.00) dollars. That your orator agreed with complainant to take said old apparatus of complainant in part payment for said new fountain, carbonater and other goods, the price of which was three thousand, two hundred and nineteen, ($3,219.00) dollars and to allow complainant the sum of eleven hundred and ninety-four, ($1194.00) dollars for said old machine, leaving a balance due your orator of two thousand and twenty-five, ($2,025.00) dollars. That upon said October 26th, 1900, the complainant executed and delivered to your orator a written order and contract, dated October 26th 1900, in which written instrument complainant ordered said goods, and agreed and bound himself to pay to your orator $2,025.00 for said apparatus, carbonator, attachments,
35 furnishings, etc. and other goods heretofore set out, delivered and set up in complainant's store upon the terms as follows: One hundred dollars cash upon receipt of bill of lading, or tender of goods, and the balance in thirty-six (36) equal monthly payments beginning April 1st, 1901, with interest from April 1st, 1901, at five per cent. per annum. And for said balance and interest, complainant agreed to execute and deliver contract notes of like tenor, and form to one printed on the back of said order and maturing as above set out: that said written order and contract and form of note on the back thereof stipulated for and retained a mortgage lien in favor of your orator upon said apparatus, carbonator, goods, etc., to secure the payment of said sum of $2,025.00 as aforesaid. A copy of said order and contract together with the form of said notes is hereto

attached, marked Exhibit "A," and made a part of this cross-complaint.

Fourth. Your orator further shows that upon receipt of said order above referred to and marked Exhibit "A," it accepted the same, and afterwards manufactured said apparatus in accordance with the terms of said order and contract, and that thereafter, on or about the 8th day of February, 1901, shipped said soda fountain apparatus to the defendant, at Dallas, Texas, together with the other goods called for in said order and that soon thereafter, said apparatus, carbonator, furnishings, etc., and other goods were delivered to said complainant at his store in Dallas, Texas, and said apparatus was adjusted, put together and set up in complainant's store without cost or expense to complainant.

That said apparatus, carbonator and other goods were strictly and in all respects in accordance with the order and contract of
36 the complainant and your orator, in all things, strictly complied with the terms of the order and contract of complainant.

Fifth. Your orator further says that said apparatus was made of the very best material, was skillfully put together, was exceedingly handsome in appearance, being furnished with mirrors and fixtures for electric lights, and was, with the other goods so shipped to complainant, in strict compliance with the order of the complainant, and when set up in complainant's store well worth the contract price thereof, to-wit: three thousand, two hundred and nineteen dollars, ($3,219.00) and exceeded in value, by at least two thousand and twenty-five dollars, the apparatus of the complainant, which was old and second hand and greatly out of order, and not exceeding in value eleven hundred ($1100.00) dollars.

Sixth. That soon after the delivery of said apparatus complainant paid your orator the sum of three hundred and twenty-five ($325.00) dollars, but failed and refused to execute said notes, has further failed and refused to comply with his said contract, or to pay your orator any further sums of money whereby the whole of said debt became due and at once payable and the complainant became liable to your orator for a balance of seventeen hundred ($1700.00) dollars with interest. But though often requested, complainant has failed and refused and still fails and refuses to pay the same or any part thereof, and still retains and uses said apparatus and other goods.

Seventh. That your orator has a valid and subsisting mortgage lien upon said apparatus and goods hereinbefore described to secure the payment of said balance of seventeen hundred dollars.

Eighth. Wherefore, your orator, to the end that it may obtain relief to which it is justly entitled in the premises, prays the court to grant to it your writ of subpœna directed to the said W. S. Kirby requesting and commanding him to appear herein and answer
37 not under oath, an answer under oath — expressly waived, to the several allegations in this cross-bill contained. Your orator further prays for judgment against said W. S. Kirby in the

sum of seventeen hundred dollars with interest at five per cent. per annum from the first day of April 1901, and for a decree establishing its mortgage lien upon the property hereinbefore described, and for a foreclosure of said mortgage and sale of said property under proper order of the court, and for such other and further relief, preliminary and final as to the court may seem proper and meet and which equity may require and for costs of suit.

AMERICAN SODA FOUNTAIN COMPANY,
By J. W. THOMPSON, *Its Attorney and Counsel.*

THOMPSON & THOMPSON,
Solicitors and Counsel for American Soda Fountain Company, Cross Complainant.

38 EXHIBIT "A."

Salesman George Sturges.

DALLAS, TEXAS, *Oct. 26th*, 1900.

American Soda Fountain Co., Boston, Mass.:

Forward the following described soda water apparatus, and upon receipt of bill of lading or tender of goods I will honor sight draft or other demand for $100 and the balance I promise to pay in monthly sums as follows 36 equal payments beginning April 1st, 1901, interest from Apr. 1st, 1901 with interest at 5 per cent. from date of shipment, with each payment, and for such balance and interest will execute and deliver contract notes of like tenor and form to the one printed on the back of this order, and maturing as above set forth and will execute such other papers as may be necessary under the laws of the State to protect the title of American Soda Fountain Co., against all third parties. I agree to insure said apparatus for $— —, the loss, if any, payable to American Soda Fountain Co., as its interest may appear, and to keep the same insured until all payments are made. The delivery of such apparatus &c., to be conditional upon compliance with the above terms and conditions, and said apparatus to remain the property of American Soda Fountain Co. till paid for.

In case American Soda Fountain Co., is to take any second hand soda water apparatus in exchange, the undersigned warrants it free from all liens, and agree- to put such apparatus in as good condition as possible and pack and ship it as directed by said American Soda Fountain Co.

Description of apparatus? State name of apparatus and varieties of marbles. Also wood and finish of top. Special Versailles onyx & W. & G. top. 1 constant carbonator 220 volts 10 ft. supply to conn. app.:

Size of apparatus. State number syrup faucets and draught

tubes required. 22 syrup faucets, 3 soda draught tubes 4
39 mineral draught tubes. Prices. Apparatus $— — carbonator — generator, — fountains — tumbler washer — tumbler holders — tumblers — marble slabs — pipe — juices. — $2025.

Mineral water name plates (check those wanted)—Kissengen, vichy, seltzer, Pavilion, Congress, Peruvian beer, Ottawa beer, ginger ale, ale, root beer, Spear beer. Syrup name plates (check those wanted)—Lemon, vanilla, sarsaparilla, pineapple orange, ginger, orgeat, strawberry, raspberry ambrosia, coffee cream, tonic, hock, claret, nectar, rose,chocolates, blackberry, Don't Care, maple, wild cherry, catawba, sherbet, wintergreen, bananna, plain, checkerberry, tea.

Length of supply pipe.—Pipe is furnished extending two feet under the counter. If more is wanted the price is fifteen cents per foot. State length of each supply pipe from bottom of apparatus. Also whether a pipe coupling or the fountain clamp joint is required. No. clamps will be furnished with either apparatus or fountain unless specified on order. Necessary clamps will be sent without charge with apparatus when so specified, not exceeding one for each draught. 1–50 ft. supply M. & F. M. f- clamp

— constant carbonator — volts (if alternating current give voltage at point of installation) — cycles, — phases — reliable carbonator — lbs. city water pressurem — liquified gas outfit No —. — No. — generator — fountains. 24 No. j tumbler holders — No — tumblers 24–7 in. spoons — No. — tumbler washer. — tumbler drainer — change stands. 1–1925 pitchers 1–1879 bowls 1–1925 spoon holders — syrup bottles — shakers — trays — crushed fruitbowl — two way cock, — ice shaver — lemon squeezer. 1 base marble slab, — dispensing slab. (Give exact diagram on separate sheet indicating how the edges
40 are to be finished and where apparatus is to be placed. State on paper diagram which is the upper side.

Juices &c. 2 silver lids, 1–1169 straw vase.

Transportation (avoid lines requiring reshipment if possible.

When shipped: Mention the date, (if possible, that delays in transportation may be obviated. Morgan line as soon as possible. Freight and setting up charges to be paid by consignee.

This order cannot be countermanded and this is fully understood by the signer. There are no other conditions or agreements with your salesman except those herein stated, and no claim will be made by me for anything not specified herein.

Name of bank to which papers are to be sent for collection: ——

W. S. KIRBY.

(Write name and send business card.)

References: App. & carb. to be put up in store at price sold.

Exhibit "A."

40½ $——. ——, 190–.

For value received, —— after date —— promise to pay to the order of American Soda Fountain Co. —— dollars with interest at 6 % ——. The consideration of this and other notes is certain soda water apparatus and appurtenances described in contract between —— —— and the said American Soda Fountain Co., bearing date —— and which —— —— have received of said American Soda Fountain Co.

Nevertheless it is understood and agreed by and between —— —— and the said American Soda Fountain Co., that the title to the above mentioned property does not pass to —— —— and that until all said notes are paid the title to the aforesaid property shall remain in the said American Soda Fountain Co. which shall have the right, in case of non-payment at maturity of either of said notes without process of law, to enter and retake, and may enter and retake immediate possession of the said property, wherever it may be, and remove the same.

Payable at the —— bank.

Due ——.

—— ——.

41 STATE OF TEXAS, }
County of Dallas. }

Before me D. W. Bowser, a notary public within and for the county of Dallas, State of Texas, on this day personally appeared George Sturges, who being by me duly sworn, says on oath; My name is George Sturges, I am the George Sturges referred to in the above and foregoing cross-complaint made by American Soda Fountain Company, and I am and was on the 20th day of October 1900, the representative and salesman for The American Soda Fountain Company, cross-complainant, and made the sale referred to in said cross-complaint and know all the terms stipulations and conditions thereof. I have read the foregoing cross-complaint and know the contents thereof and the same is true of my own knowledge, excepting as to matters stated on information and belief, and as to those, I believe them to be true.

I make this affidavit because I have a personal knowledge of all the facts and because the American Soda Fountain Company is a citizen and an inhabitant of the State of Massachusetts and is out of this district and the State of Texas.

GEO. STURGES.

Sworn to and subscribed before me by George Sturges, this 12 day of May A. D. 1902.

D. W. BOWSER,

[SEAL.] *Notary Public, Dallas County, Texas.*

Endorsed as follows: In the circuit court of the United States fifth circuit and northern district of Texas at Dallas. No. 567 In equity. W. S. Kirby *vs.* American Soda Fountain Company. Demurrer answer and cross-complaint of American Soda Fountain Company. Filed 12 day of May 1902. J. H. Finks, clerk, by W. A. Porter, deputy. Thompson & Thompson solicitors and counsel for American Soda Fountain Company.

41½ In the United States Circuit Court for the Northern District of Texas, at Dallas.

The President of the United States of America to W. S. Kirby, Dallas county, Greeting:

You are hereby commanded to appear personally before the honorable circuit court of the United States for the northern district of Texas, in the fifth circuit, at a court to be holden at the city of Dallas in and for said circuit, on the first Monday of June next, or whensoever the said court shall be there to answer a cross bill exhibited against W. S. Kirby by American Soda Fountain Company, and to do further and receive what the said court shall have considered in that behalf. And this that you are not to omit under the penalty of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of [SEAL.] the circuit court of the United States for the northern district of Texas, at the city of Dallas, this 13th day of May, 1902, and of the Independence of the United States of America, the 126 year.

J. H. FINKS,
Clerk U. S. Circuit Court, Northern District of Texas,
By —— ——, *Deputy.*

The defendant W. S. Kirby is required to enter an appearance in the above suit, in the clerk's office, on or before the first Monday of June next, otherwise the bill will be taken as confessed.

J. H. FINKS, *Clerk,*
By W. A. PORTER, *Deputy.*

[Endorsed:] Original. No. 567 Eq. Chancery. In the U. S. circuit court, Dallas Texas. W. S. Kirby *vs.* American Soda Fountain Company. Subpœna in chancery. Issued May 13th 1902, Returnable June rules, 1902 J. H. Finks, clerk. By W. A. Porter, deputy. Returned and filed 19 day of May 1902 J. H. Finks, clerk. By W. A. Porter, deputy. To W. S. Kirby, Dallas county.

Marshal's Return.

Received this writ on the 13th day of May 1902, and I executed the same on the 19th day of May, 1902, by delivering to the within named defendant W. S. Kirby, in person a true copy of this writ.

GEO. H. GREEN,
U. S. Marshal, N. D. T.,
By R. M. WARDEN, *Deputy.*

Fee	$2.00
Mileage or actual expenses car fare	10
Total	$2.10

42 *Motion to Transfer to Law Docket.*

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN CO. } No. 567.

Now comes plaintiff and moves the court to transfer this cause to the law docket because the plaintiff's cause of action sounds in damages and is cognizant at law.

McCORMICK & SPENCE,
Att'ys for Plaintiff.

Endorsed as follows: No. 567 Eq. W. S. Kirby *vs.* Amr. Soda F. Co. Motion to transfer to law docket. Filed June 20 1902. J. H. Finks clerk.

Order Dismissing Original Bill.

W. S. KIRBY
vs.
AMR. SODA FOUNTAIN CO. } No. 567. In Equity.

JUNE 20TH, 1902.

Complainant coming and asking that the original bill of complaint be dismissed without prejudice and it appearing to the court that said request should be granted. It is therefore ordered that the original bill of complaint herein be and the same is hereby dismissed without prejudice to the right of the plaintiff to proceed further on the cause of action set forth in said bill hereafter as he may be advised,

It is further ordered that the costs of the original bill and proceedings thereon herein be adjudged against complainant for which execution may issue.

June 20th 1902.

EDWARD R. MEEK, *Dist. Judge.*

Endorsed as follows: No. 567 Eq. W. S. Kirby *vs.* Amr. Soda Fountain Co. Order dismissing orig. bill. Filed June 20th, 1902. J. H. Finks, clerk.

43 *Plea.*

In the Circuit Court of the United States for the Northern District of Texas. In Equity.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 567.

The plea of W. S. Kirby, defendant in the cross bill, to the cross bill of American Soda Fountain Company, defendant in the original bill.

This defendant in cross bill by protestation, not confessing or acknowledging all or any of the matters and things in the cross bill of complaint mentioned and contained to be true in such sort, manner and form as the same are therein set forth and alleged for plea to the whole of said cross bill, says that the original bill, or petition, filed by said W. S. Kirby in the district court of Dallas county, Texas and removed into this honorable court, has been by the said W. S. Kirby dismissed. And the cross bill above mentioned, is not within the jurisdiction of this honorable court, because the amount in dispute under the allegations of said cross bill do- not exceed, exclusive of interest and costs, the sum or value of two thousand dollars; for that the plaintiff in said cross bill seeks therein for a recovery against the defendant in said cross bill of a sum less than two thousand dollars exclusive of interest and costs, which said sum not including interest and costs, sought to be recovered in said cross bill is the sum of $1700.00 only, which is the only matter or amount in dispute in said cross bill.

All matters and things this defendant in the cross bill doth aver to be true, and he pleads the said matters and want of jurisdiction to the said cross bill as a whole, and prays the judgment of this honorable court whether he should be compelled to make any other or further answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

McCORMICK & SPENCE,
Counsel for W. S. Kirby, Defendant in the Cross Bill.

44 STATE OF TEXAS, }
County of Dallas. }

W. S. Kirby makes solemn oath, and says that he is the defendant in the cross bill in the above numbered and entitled suit, and that

the foregoing plea is not interposed for delay and that the same is true in point of fact.

W. S. KIRBY.

Sworn to and subscribed before me, this 24th day of July A. D. 1902 by the said W. S. Kirby, as witness my hand and official seal on the day last before written.

EDWARD M. BROWDER,
[SEAL.] *Notary Public in and for Dallas County, Texas.*

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

J. M. McCORMICK,
Counsel for W. S. Kirby, Defendant in the Cross Bill.

Endorsed as follows: No. 567 Eq. W. S. Kirby *vs.* American Soda Fountain Company. Plea of W. S. Kirby to the cross bill exhibited against him by American Soda Fountain Company. Filed 24th day of July 1902. J. H. Finks, clerk. By C. B. Hollarn, deputy.

Request to Have Plea Set Down.

Request to have plaintiff's plea to jurisdiction set down for argument.

In the Circuit Court of the United States, Fifth Circuit and Northern District of Texas, at Dallas.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 567. In Equity.

To the honorable judges of said court:

Now comes American Soda Fountain Company defendant,
45 and respectfully asks the court that the plaintiff's plea to the cross bill of the defendant filed herein July 24th, 1902, be set down for argument at the next rule day of these honorable courts:

AMERICAN SODA FOUNTAIN COMPANY,
By THOMPSON & THOMPSON,
Solicitors for Defendant.

J. W. THOMPSON, *Of Counsel.*

Endorsed as follows: No. 567 Eq. W. S. Kirby *vs.* American Soda Fountain Company. Request to have plaintiff's plea to jurisdiction set down for argument. Filed 14th day of Aug., 1902. J. H. Finks, clerk, by C. B. Hollarn, deputy. Thompson & Thompson, att'ys for defendant.

Order.

In U. S. Circuit Court, 5th Circuit and Northern District of Texas, at Dallas.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY.

THE 5TH DAY OF FEBRUARY, A. D. 1903.

This day the plea of the plaintiff to the jurisdiction of this court to hear and determine the matters now in controversy between the parties coming on to be heard came the plaintiff W. S. Kirby *plaintiff* and the defendant American Soda Fountain Co. by their attorneys and submit said plea to the courts and the same being considered the court is of opinion that said plea is not well taken and the same is overruled to which action of the court the plaintiff in open court excepts and upon application of plaintiff he is given until the rule day in April to answer defendant's cross-bill.

EDWARD R. MEEK, *Judge.*

Endorsed: No. 567. Eq. W. S. Kirby vs. American Soda Fountain Co. Order. Filed Feb'y 5th, 1903. J. H. Finks, clerk.

46 *Judgment Pro-Confesso.*

In the Circuit Court of the United States, Fifth Circuit and Northern District of Texas, at Dallas.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 567. In Equity.

It appearing that the subpœna issued on the defendant's cross complaint against the complainant, W. S. Kirby, was duly and regularly served upon said W. S. Kirby on the 19th day of May 1902, by delivering to W. S. Kirby, complainant in person at Dallas, Texas, in said district, an attested copy of said subpœna, and it further appearing that afterwards, to-wit on July 24th 1902 the said W. S. Kirby complainant, filed his plea to the jurisdiction of this court to hear and determine matters set up in said cross bill. And it further appearing that on the 5 day of February 1903, said plea was, by the court overruled, and the said complainant W. S. Kirby, allowed until the rule day in April to answer said cross complaint of the defendants. And it appears that the said W. S. Kirby has

not further appeared and has not filed any further plea, demurrer or answer in said cause.

Now therefore, on motion of Thompson & Thompson, solicitors for the defendant American Soda Fountain Company, it is ordered that the cross complainant in said cause, be taken *pro confesso* as to said complainant, W. S. Kirby, in accordance with the rules in said cases made and provided.

THOMPSON & THOMPSON,
Solicitors for Defendant, American Soda Fountain Company.

This the 21st day of April A. D. 1903.

Endorsed as follows: No. 567. Eq. W. S. Kirby *vs.* American Soda Fountain Co. Judgment *pro confesso*. Filed 21 day of April 1903, J. H. Finks, clerk by C. B. Hollarn, deputy.

47 *Decree.*

In the Circuit Court of the United States, Fifth Circuit and Northern District of Texas, at Dallas, May, Term A. D. 1903.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 567. In Equity.

WEDNESDAY, *The 27th Day of May, A. D.* 1903.

It appearing to the court that heretofore towit on the 12th day of May, 1903, the defendant American Soda Fountain Company, filed in this court and in the above entitled cause, its cross complaint against W. S. Kirby, complainant, to the bill filed against it in this court by the said complainant W. S. Kirby asking for cancellation of written contract for the payment of $2025, and for $2500., damages; that on the 13th day of May 1902, a subpœna was issued out of this court on said cross complaint and was duly and regularly served on the said W. S. Kirby, complainant, on the 12th day of May 1902, by delivering to said W. S. Kirby, complainant in person at Dallas, Texas, in said district, an attested copy of said subpœna.

It further appearing that afterwards to-wit on June 20th 1902 the said W. S. Kirby complainant appeared in open court and dismissed his said bill and suit against the defendant American Soda Fountain Company; that afterwards to-wit on the 24th day of July, 1902, the said W. S. Kirby, complainant, filed his plea to the jurisdiction of this court, to hear and determine the matters and things alleged against him in said cross complaint, which said plea to the jurisdiction of the court, was afterwards to-wit on the 5th day of February, 1903, considered by the court, and was on said 5th day of February overruled by this court and said cause retained for

trial on defendant's said cross complaint against the said W. S. Kirby and the said W. S. Kirby was, by order of the court,
48 allowed until the rule day in April 1903, the same being the 6th day of April, 1903, to answer the said cross complaint of the defendant.

And it further appearing that the said W. S. Kirby, complainant did not further appear, and has not filed any further plea, demurrer or answer in said cause, and that an order taking said cross complaint *pro confesso* was duly entered on the 21st day of April, 1903, in the order book, and that no proceedings have been had or taken by the said complainant since said order was so entered.

And it appearing that more than thirty days have elapsed after entering said order, as aforesaid to-wit on the 21st day of April 1903; and the complainant still failing to further appear, plead, demur or answer to said cross complaint, upon application of defendant duly made, the court, on consideration of the premises, does order and decree that said cross complaint be taken for confessed; and it appearing that the allegations in said cross complaint and the exhibits thereto, are true, and that the said W. S. Kirby is justly and truly indebted to the said American Soda Fountain Company, defendant in the sum of $1700, with interest thereon, at the rate of 5% per annum, from the 1st day of April 1901, said principal and interest amounting to the total sum of $1883.29.

It further appearing to the court that a valid mortgage lien existed on April 1st, 1901, and does now exist in favor of the American Soda Fountain Company against the said W. S. Kirby to secure the payment of said sum of $1883.29 upon the following described personal property, now in possession of the said W. S. Kirby at his store in Dallas, Dallas county, Texas viz:

1 special Versailles onyx soda fountain apparatus W. & G. (white and gold) top.
1 marble base slab,
2 dozen J. tumbler holders,
49 2 dozen bar spoons, 7 inches,
1 No. 1925 spoon holder,
1 No. 1169 straw vase,
1 No. 1879 sugar bowl,
2 silver lids,
1 50 ft. B. T. supply pipe
1 No. 1925 2 quart cream pitcher,

It is therefore considered, ordered, adjudged and decreed by the court that the defendant, American Soda Fountain Company do have and recover of the complainant, W. S. Kirby, said sum of $1883.29, together with interest thereon from the date of this decree, at the rate of 5 % per annum, together with its costs in this behalf expended.

It is further ordered, adjudged and decreed that the said mortgage lien, as it existed on April 1st, 1901 in favor of the American

Soda Fountain Company upon the property hereinbefore described, be and the same is now here foreclosed.

It is further ordered, adjudged and decreed that upon complainant, W. S. Kirby's paying to The American Soda Fountain Company, defendant, said sum of $1883.29 with interest and all costs within sixty days from the date of this judgment, the said payment shall be in full of this judgment and decree and in satisfaction of said mortgage lien upon said above mentioned property which property shall thereby be released to the said W. S. Kirby.

And it is further adjudged and decreed that in default of such payment by the said W. S. Kirby, or by some one on his behalf, all of said above described property, or so much of the same as shall be sufficient to raise the amount due defendant for principal, interest and costs in this case, shall be sold at public auction for cash by or under the direction of George H. Green Esq., who is hereby appointed special commissioner for the purpose of making said
50 sale, that said sale be made in Dallas county, Texas, where said mortgage property is situated; that said commissioner shall give public notice of the time and place of such sale, according to the course and practice of this court; that the commissioner execute a bill of sale to the purchaser of said mortgage property on the said sale, and that the said master pay to the defendant American Soda Fountain Company or its solicitor out of the proceeds of said sale, the said sum of $1883.29 with interest and the costs in this suit to be taxed, or so much as the purchase money of the mortgage property will pay of the same; and that the said master bring the surplus money received from the said sale, if any there be, into court without delay to abide the further orders of this court.

It is further ordered, adjudged and decreed that should said above named property at said commissioner's sale fail to bring the said sum of $1883.29 with interest and costs, then the said American Soda Fountain Company shall have execution against the said W. S. Kirby for said difference, for all of which let execution issue.

EDWARD R. MEEK, *Judge.*

Endorsed as follows: No. 567 Eq. Decree. Filed May 27, 1903. J. H. Finks, clerk.

51 *Petition for Appeal.*

In the Circuit Court of the United States for the Northern District of Texas. In Equity.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. —.

Your petitioner, W. S. Kirby, respectfully represents that there is manifest error committed to the injury of the petitioner by the

final decree pronounced in this cause on the 27th day of May, 1903, and by the interlocutory order and decree overruling the petitioner's plea to the jurisdiction to the court over petitioner as the defendant in the cross bill filed by the American Soda Fountain Company in the above cause, which said plea to the jurisdiction called to the court's attention the fact that the amount in controversy in said cross bill was less than the sum or value of two thousand dollars, and that the original bill in the cause had been dismissed by the complainant therein, with the consent of the court without prejudice at a former term of the court. That said plea to the jurisdiction was overruled, and your petitioner failed to file further defenses to the cross bill and final decree was entered in favor of the complainant in the cross bill against your petitioner, on the 27th day of May, 1903, for the sum of $1833.39.

Wherefore, petitioner, W. S. Kirby, considering himself aggrieved prays an order granting an appeal from the said final decree and interlocutory order overruling his plea to the jurisdiction to the Supreme Court of the United States, as authorized by section V of the act of Congress of the United States approved March 3, 1891. And petitioner herewith files his bond in the penal sum of $2500.00,

52 which bond is approved by the Honorable Edward R. Meek, one of the judges of this court.

J. M. McCORMICK,
WENDEL SPENCE,
Solicitors for Petitioner, W. S. Kirby.

Upon consideration of the petition for appeal to the Supreme Court of the United States, filed herein by W. S. Kirby it is ordered that said appeal be granted, bond therefor in the penal sum of $2500.00 having been executed and approved by the court, and that a supersedeas be granted.

This appeal is granted solely upon the question of jurisdiction which, as set forth in the foregoing petition for appeal is certified to the Supreme Court of the United States, and in order that the Supreme Court may properly determine the question of jurisdiction (no other question having been tried in the circuit court), it is ordered that a transcript of the record, proceedings and papers upon which the decree was made, duly authenticated, be sent to the Supreme Court of the United States.

Dated, this 8th day of June, A. D. 1903, and during the term at which said decree was entered.

EDWARD R. MEEK,
District Judge.

Endorsed as follows: No. 567 Equity. W. S. Kirby *vs.* The American Soda Fountain Company. Petition for allowance of appeal. Filed 10 day of June 1903. J. H. Finks, clerk by C. B. Hollarn, deputy.

53 *Assignment of Error.*

In the Circuit Court of the United States for the Northern District of Texas. In Equity.

W. S. KIRBY
vs.
THE AMERICAN SODA FOUNTAIN COMPANY. } No. —.

Assignment of errors.

And now on the 8th day of June, 1903, came the plaintiff by J. M. McCormick and Wendel Spence, his solicitors, and says that the decree in said cause is erroneous and against the just rights of said plaintiff, for the following reasons:

1. Because the court had no jurisdiction to render the decree on the cross bill (after the original bill had been dismissed with leave of the court without prejudice) for the lack of jurisdictional amount in controversy.

2. Because the court should have sustained the plaintiff's plea to the jurisdiction interposed against the cross bill and dismissed the cross bill.

Wherefore, the said plaintiff prays that the said decree be reversed, and that the said court may be directed to enter a decree dismissing the cross bill for want of jurisdiction.

J. M. McCORMICK,
WENDEL SPENCE,
Solicitors for Plaintiff.

Endorsed as follows: No. 567 Equity. W. S. Kirby *vs.* The American Soda Fountain Company. Assignment of errors. Filed 10 day of June 1903. J. H. Finks, clerk. By C. B. Hollarn, deputy.

54 *Bond.*

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. —. In Equity.

Know all men by these presents: That we, W. S. Kirby as principal, and the other subscribers as sureties, are held and firmly bound unto the said American Soda Fountain Company a corporation in the full and just sum of $2500.00 to be paid to said American Soda Fountain Company, its attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and firmly by these presents.

Sealed with our seals, and dated this 5th day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, the above named W. S. Kirby, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the judge of the circuit court of the United States for the northern district of Texas:

Now, therefore, the condition of this obligation is such that if the above named W. S. Kirby shall prosecute said appeal to effect and pay all damages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Witness our hands and seals on the day last before written.

W. S. KIRBY.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,

By E. M. REARDON,

Resident Vice-President.

J. S. GROCE,

Resident Assistant Secretary.

Approved as an appeal bond by me, this 8th day of June A. D. 1903,

EDWARD R. MEEK,

District Judge.

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

55 "The regular quarterly meeting of the board of trustees of the American Surety Company of New York, was held at the company's office, No. 100 Broadway, in the city of New York, on Wednesday, January 16, 1901, at 12 o'clock noon.

"Mr. Wheelock called the meeting to order.

"On motion of Mr. Wheelock, Cornelius N. Bliss was elected chairman.

"On motion, David B. Sickels was elected secretary.

"The secretary read the report of the nominating committee as follows:

"To the board of trustees of the American Surety Company of New York.

"GENTLEMEN: The committee appointed by the executive committee of this company at their meeting held Wednesday December 12, 1900, for the purpose of nominating officers of the company. * * * for the ensuing year; beg leave to report as follows:

We nominate for resident vice presidents at Dallas, Texas;
John N. Simpson,
Edwin M. Reardon,
J. T. Trezevant,
Sam P. Cochran,
Resident assistant secretaries at Dallas, Texas:
J. S. Groce,
Frank Reeves.

* * * * * * *

"On motion of John N. McCook, the secretary was authorized to cast one ballot on behalf of the trustees present, and the aforementioned officers * * *, as recommended by the nominating committee, were declared to have been unanimously elected to their respective offices for the ensuing year." "The following resolution was adopted: "Resolved, that the resident vice-presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and attach the seal of the
56 company to any and all obligations for or on behalf of the company, such obligations, however, to be attested in every instance by the resident assistant secretary."

STATE OF NEW YORK, }
County of New York, } ss:

I, Henry Tofts, assistant secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the record book of the board of trustees of the American Surety Company of New York, with the original record of said board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said record book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 25th day of January, 1901.

HENRY TOFTS,
Assistant Secretary.

[SEAL.]

Endorsed: No. 567 Eq. W. S. Kirby *vs.* American Soda Fountain Company. Supersedeas appeal bond. Filed 10th day of June 1903, J. H. Finks, clerk By C. B. Hollarn, deputy.

57 UNITED STATES OF AMERICA, *ss:*

The President of the United States to American Soda Fountain Company and J. W. Thompson, its solicitor of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be held at Washington in the District of Columbia, within thirty days from the date of this writ, pursuant to an order of appeal filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Dallas, wherein W. S. Kirby is appellant and American Soda Fountain Company is appellee, to show cause, if any there be, why the decree in said order of appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of June, A. D. 1903, and of the Independence of the United States the 127th year.

{ The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas. }

EDWARD R. MEEK,
United States District Judge.

Service of the above is accepted this 30th day of June, 1903.

AMERICAN SODA FOUNTAIN COMPANY,
By J. W. THOMPSON,
Its Solicitor of Record.
J. W. THOMPSON.

[Endorsed:] Original. No. 567. Eq. W. S. Kirby *vs.* American Soda Fountain Company. Citation. Filed 10 day of June, 1903, at — o'clock —. m. J. H. Finks, clerk, by C. B. Hollarn, deputy.

58 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, assignment of errors and all the proceedings in cause No. 567, in equity, wherein W. S. Kirby is complainant and The American Soda Fountain Company is respondent, except the original citation in error is included therein instead of a copy thereof, as fully as the same remains on file and of record in my office at Dallas, Texas.

Witness, my hand officially and the seal of said court at Dallas, Texas, this the 2nd day of July A. D. 1903.

{ The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas. }

J. H. FINKS, *Clerk*,
By C. B. HOLLARN, *Deputy*.

Endorsed on cover: File No. 19,008. N. Texas C. C. U. S. Term No. 357. W. S. Kirby, appellant, *vs.* American Soda Fountain Company. Filed July 14th, 1903.